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IN THE

Supreme Court of the United States

October Term, 1963

No. 72

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles [R. 109-117][1] is unreported. For the convenience of the Court, a copy of the opinion is attached hereto as Appendix A.

[1]The reference "R" is to the certified record prepared by the Clerk of the court below, and now on file with this Court. A motion to dispense with the printing of the record is pending before the Court. A copy of the corresponding page references in the certified record for each volume of the Reporter's Transcript on Appeal below was furnished to counsel for respondent on August 12, 1963, prior to the filing of the brief herein.

Jurisdiction.

The judgment of the court below [R. 114] was dated and entered on October 24, 1962. On the same day, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made and entered an order in the case entitled: Order Certifying Cause to District Court of Appeal [R. 118].

On November 15, 1962, the District Court of Appeal of the State of California for the Second Appellate District, Division Three, made and entered an order in the case entitled: Order Denying Transfer on Certification, one Judge voting to grant transfer [R. 119].

By the aforesaid denial of transfer, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. Calif. Constitution, Article VI, Sections 4, 4b, 4e, 5; Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 61 *et seq.*; Calif. Rules of Court, Appellate Rules, Rules 24(a), 28(a), 28(b). *Smith v. California*, 361 U. S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U. S. 220, 222.

By order of Mr. Justice Douglas dated January 11, 1963, the time to file a petition for a writ of certiorari was extended to and including February 13, 1963. The petition was timely filed and granted on April 29, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented.

1. Whether the sale of *Tropic of Cancer* by Henry Miller is not protected against criminal punishment by the guarantees of free expression afforded by the First and Fourteenth Amendments.

2. Whether California Penal Code, 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, deprives petitioner of liberty of speech and press without due process of law contrary to the free speech and press provisions of the First Amendment subsumed into the due process clause of the Fourteenth Amendment as a limitation on state action.

3. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, fails to provide reasonably ascertainable standards of guilt and therefore deprives petitioner of his liberty without due process of law contrary to the due process provision of the Fourteenth Amendment.

4. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer* by petitioner because deemed to be utterly without redeeming social importance to the "average person" in the "Los Angeles community," abridges the freedoms of speech and press and deprives petitioner of his liberty without due process of law and denies petitioner the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of*

Cancer, the dominant theme of the said book, taken as a whole, not appealing to prurient interest nor going beyond contemporary standards in the description of sex, and believed by petitioner to have ideas of redeeming social importance and therefore not obscene, deprives petitioner of liberty of speech and press and permits petitioner's conviction without evidence of guilt contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the rulings and the instructions of the trial court, and refusal to instruct, with respect to the standards for judging the alleged obscenity of *Tropic of Cancer*, upheld by the court below, deprived petitioner of his liberty without due process of law contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of California Penal Code 311 and 311.2 are set forth in Appendix B attached hereto.

Statement.

In a complaint [R. 2] filed in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, petitioner, a bookseller [R. 138-139] was charged with a violation of California Penal Code 311.2. It was alleged that on or about October 9, 1961 in the City and County of Los Angeles, the petitioner did knowingly exhibit and distribute "obscene matter, to wit: the book 'Tropic of Cancer,' by Henry Miller." The cause came on for trial before Honor-

able Kenneth L. Holaday, a Judge of the said Municipal Court, and a jury [R. 126, 138].

After the book was received in evidence [Peo. Ex. 4; R. 348], it was read to the jury [R. 367-379, 392-396, 413-415, 417-421].

The extensive trial thereafter was made up largely of testimony of witnesses offered by the People [R. 568, 660, 758, 800, 912, 951, 983, 1027, 1996, 2146, 2231, 2251, 2289, 2350, 2425, 2524, 2735] and by petitioner [R. 678, 860, 1081, 1108, 1160, 1276, 1304, 1364, 1460, 1589, 1613, 1648, 1725, 1744, 1930, 1940, 1944, 2565, 2683, 2780] with respect to whether or not the book was nonobscene and had redeeming social importance.

The trial court's views as to "the general rules in connection with expert witnesses in this type of case" [R. 513] were outlined to counsel prior to the testimony given by the witnesses. The trial court stated that a witness could testify as to the "ultimate conclusion" [R. 514] respecting the obscenity or nonobscenity of a writing only if the witness could also testify to circumstances demonstrating "what the common conscience of the community was and is, what the moral fiber of the community is" [R. 514].

The ultimate conclusion of obscenity or nonobscenity, in the opinion of the trial court, "is predicated upon what the average person in the community would feel towards a given writing" [R. 515], from which it followed that a basis had to be established from which the jury could infer that the expert witness "was familiar with the common conscience of the community" [R. 515]. The trial court stated that "the determination

of whether or not it has social importance would have to be based upon the common conscience of the community, that is the average person in the community" [R. 516].

The trial court stated that the state obscenity statute did not permit a qualified expert witness to testify who was only familiar with the common conscience of "New York" or "Philadelphia, Boston or Dallas, Texas" [R. 517]; that a witness could testify only if it were established "that he was familiar with the common conscience in this community" [R. 517]. The trial court stressed "that to have an intelligent basis upon which this social importance has to be measured, it would have to be by the average person exercising the common conscience in this community" [R. 518].

Throughout the trial, the witnesses were accordingly restricted to testifying whether or nor in their opinion *Tropic of Cancer* had any "social importance" to the "average person" in the "Los Angeles" community [R. 513-518, 601-602, 665-668, 673-675, 946, 994-996, 1023-1026, 1051-1052, 1198-1199, 1378-1379, 1500-1501, 1730-1737, 1961-1962, 1976-1977, 1990-1991, 2019, 2022-2032, 2034-2040, 2262-2267, 2294-2299, 2434-2444, 2494-2497, 2536-2538, 2637-2638, 2717-2719, 2742-2745, 2750-2753, 2803-2808].

When trial counsel for petitioner, dissenting from the views of the trial court, urged that "matters may be of extreme social importance which might never come to the attention of the average person" [R. 1024], the trial court replied: "The average person in this community would have to weigh the social importance, establishing first that it has social importance, and the test would be does the average person in this

community believe that it is excused, even though it does appeal to prurient interest" [R. 1025].

On this aspect of the case, the trial court merely instructed the jury that "to be of social importance the matter must be of value to society; thus a matter that is of no value to society is utterly without redeeming social importance" [R. 2821-2822]. The trial court refused to instruct the jury that the words "redeeming social importance" include, among other things, the literary or artistic value or merit of the book; include the theological, sociological, educational, or other social values of the writing; that offensiveness to the sensibilities of an individual, or even a substantial segment of the community was not sufficient to condemn the book; that the free speech provisions of the First Amendment permit wide varieties of taste and reject official norms; that the guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority, and other instructions of a like character [R. 62, 64, 65, 74, 90-102, 103]. The trial court also refused to instruct the jury "that in applying contemporary standards to the book, you are not restricted to the City of Los Angeles nor even to the Los Angeles Metropolitan area" [R. 61].

Pursuant to the aforesaid strictures of the trial court, the prosecution witnesses testified that in their opinion, to the average person in the Los Angeles community, *Tropic of Cancer* is obscene and without redeeming social importance [R. 581-582, 763-764, 806-807, 915-916, 955-956, 988-989, 1030-1031, 2006, 2152-2153, 2235-2236, 2253-2254, 2295-2296, 2355-2356, 2430-2431, 2488-2489, 2531-2532, 2744-2745].

The witnesses for the petitioner testified that the book, to the average person, was not obscene and was a writing of social importance [R. 689-690, 861-862, 1111-1112, 1163-1164, 1281-1282, 1370-1372, 1464-1465, 1594-1595, 1619-1620, 1653-1654, 1933-1935, 1954-1955, 2571-2572, 2692-2693, 2784-2785].

The book was deemed to be of social importance by petitioner's witnesses because of "the power of its language, the fidelity of its description and the feeling for individual characters" [R. 740]; ". . . he [Miller] is trying to divest himself of the usual attitudes of good or bad or praise or blame and see the thing as it is" [R. 872]; ". . . tells us something about human beings, human experience" [R. 1116]; ". . . this book helps the average man or any man to admit to himself some of the features of his private life before they have been explained away" [R. 1172].

The witnesses for petitioner repeatedly stressed the social value of the ideas contained in *Tropic*. ". . . it has social redeeming graces, redeeming social importance, as a minister, saying this from the religious point of view, from the point of view of one looking insightfully into life and seeing meaning or non-meaning" [R. 1327]; ". . . work which comes in the tradition of the autobiography and the confession . . . tells us what the vision was of one man in one place at a certain time . . . criticism of the mores and morals and ideals of the society from which he came" [R. 1375-1377]; ". . . reminds him [the average person] that he does not have to be a victim of the machine, or of a mass society, that he is an individual, that he is entitled to his individual thoughts, his individual beliefs, his individual opinions" [R. 1467];

"Miller is not saying that you should all go to Paris and become artists and have mistresses and steal money and cadge and do whatever things he describes in this novel. What he is saying is that you do whatever is necessary for you to do in order to reach your full potentialities as an individual, and to understand that in order to be honest with anyone else, you have to be first honest with yourself and this is the first requirement for individuality and this is something that comes right through the American literary strain" [R. 1565-1566].

The witnesses for petitioner emphasized the literary values of *Tropic*. ". . . it is the literature of the large city, of the large metropolitan city—city life itself in all its variety . . ." [R. 1600]; ". . . writing this not so much as a man writing about something, but . . . writing as a man thinking about this . . . attempting to put down his perceptions, and thoughts and feelings" [R. 1621]; "I regard this work apart from the more serious part of the confessional part, a man discovering himself in our century, that I find this work one of the most hilarious books that I have read, as well. As baudy [sic] as Shakespeare" [R. 1672]; ". . . a book of an angry person . . . who feels somehow the pressures of culture and of society have drained meaning out of life at its deepest level; he is attempting . . . to redeem this . . . by tearing away some of the falseness that he sees in life, to try to say what is real in life" [R. 1935]; ". . . a healthy corrective to the glamorization of prostitution . . . to romantic illusions . . . not only the portrayal of beauty but the portrayal of the worst that man has known so that all

men can find themselves and their proper role and a confirmation of their best values through the book" [R. 1966].

The witnesses for petitioner testified to the insights which the book has to offer. ". . . the ironies and difficulties of the human condition . . . the simple aloneness and acceptance of life . . . a book about the worth of the individual" [R. 2574-2575, 2578]; ". . . unwavering honesty . . . makes us realize what a really tough problem we all have, and we all would be aware of, if we could, in trying to find a foundation for our lives, trying to find some-meaning in it, some values, some kind of purpose . . . socially important in our society to be able to face even an objectionable point of view" [R. 2694-2696, 2698]; ". . . a significant work of art . . . he [Miller] is a serious artist, a dedicated artist . . . a social critic depicting with realism a tragic evil . . . as a great work of art, it [Tropic] can be an agency for reconciling people" [R. 2787-2790].

Petitioner, testifying in his own behalf, stated that he believed that the book had ideas of social importance, that the writing was not utterly without redeeming social importance, and was therefore not obscene under the law [R. 230-231, 352, 397, 402, 1081-1083, 1751-1768, 1775-1781, 1790-1812, 1814-1818, 1819-1907, 1907-1923, 1923-1927]. The trial court declined to give proposed instructions by petitioner on this issue of intent [R. 63, 77, 78].

The trial court instructed the jury that the test is not whether the "so-called wordly-wise and sophisticated" would come to the conclusion that the book has

social importance or that its predominant appeal was not to a shameful or morbid interest in sex nor go beyond customary limits of candor [R. 2822]. ". . . you determine its impact upon the average person in the community" [R. 2822]. The trial court stated: "You may ask yourselves, does it offend the common conscience of the community by present-day standards and is it matter which is utterly without redeeming social importance" [R. 2823].

The jury returned a verdict of guilty [R. 106]. The judgment and order of the trial court was probation for a period of one year, the first 30 days of the probationary term to be served in the city jail [R. 30]. The appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles followed.

The aforesaid court below affirmed the judgment of conviction [R. 114]. The court rejected petitioner's argument that "the book 'cannot constitutionally be held obscene' under the state statute 'in light of the guarantees' of the United States and California Constitutions" (App. A, p. 1).[2] The Appellate Department held that the trial court had properly instructed the jury on the meaning of obscenity "as determined by the California and United States Supreme Courts" (App. A, p. 2).

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[2]On July 2, 1963, the California Supreme Court held that the book is not "obscene" *Zeitlin v. Arneberg*, 59 A. C. 930, ... P. 2d ....., 31 Cal. Rptr. 800. A petition for rehearing was subsequently denied. Counsel for petitioner here has been informed by William E. Doran, Deputy City Attorney, one of the attorneys for respondent in *Zeitlin*, that review by this Court will be sought either by way of a petition for a writ of certiorari or by appeal. Following the California decision in *Zeitlin*, the New York Court of Appeals on July 10, 1963 in a divided opinion held that *Tropic of Cancer* is "hard core pornography." *People v. Fritch*, ... N. Y. 2d ....., ... N. E. 2d .....

Referring to this Court's opinions in *Times Film Corp., Sunshine Book Co., One, Inc., Kingsley* and *Manual Enterprises, Inc.*, cited by petitioner, the court below held that these decisions "do not support the thesis that independent judicial judgment on review is ***required***, although, of course, it may be practiced" (App. A, p. 4). The court below held that *Tropic of Cancer* has not "the slightest tendency to show some social importance" and "lacks anything in the slightest redeeming" (App. A, p. 6).

The court below held that the jury had "impliedly found" that the book was "utterly without redeeming social importance", a finding allegedly supported by the evidence, and like any other "issue of fact", not to be disturbed on appeal (App. A, p. 2). "We believe that juries are composed of average persons" (App. A, p. 3). The court below further stated that to disturb the verdict of the jury would nullify "the People's right of trial by jury" (App. A, p. 7), and require the court to substitute its own "independent judgment in favor of the free speech and press guarantee, which we do not" (App. A, p. 6).

ARGUMENT.

Summary of Argument.

Tropic of Cancer by Henry Miller may not constitutionally be held "obscene". Accordingly, its sale and distribution are protected from state interference by the First and Fourteenth Amendments to the Constitution of the United States. The First Amendment's basic guarantee of freedom of expression includes all ideas, even if they test the conventions of the day. For this reason, the First Amendment protects literature and the arts because they serve as vehicles for the conveyance of ideas. The function of literature is to interpret, criticize, innovate, mirror, intensify, clarify and experiment—to challenge and stimulate persons to think. While this Court has held that "obscenity" is not protected expression, the Court has emphasized that there is no state power to restrict the dissemination of books which are not obscene.

Measured by constitutional standards enumerated by this Court, *Tropic of Cancer* is entitled to the First Amendment's protections. It is a serious work of literature, expresses ideas, and occupies an important position in twentieth century literature. The book has been published in many countries of the world, and a host of eminent American and world figures have attested to its literary and social importance. The Federal Government has implicitly conceded that *Tropic* is constitutionally protected, and the book circulates freely through the mails and through customs.

The book was published in this country by Grove Press, Inc., a reputable publisher whose book list includes many distinguished writers and serious works.

Tropic has been distributed with decorous advertising devoted solely to its literary merits. When *Tropic* was published in 1961, the reviewers and critics throughout the country were substantially agreed on the importance of the work. The consensus appeared to be that the book was written with serious and honest intent, that the work was of great literary significance, and that the writing contained challenging ideas vital for consideration in the modern world.

The petition for a writ of certiorari filed in this case contains a review of the literary traditions, the nature and character of the arts and the philosophy which permeated the first half of the twentieth century, out of which the book, *Tropic of Cancer*, and its author, emerged. There is also contained therein a somewhat extended analysis of the book's artistic and ideological form and content. The brief here sets forth in summary the material there presented. Henry Miller is a voice in the traditions of both the old and new world. Miller's book, *Tropic of Cancer*, reflects the concern of such early American writers, as Thoreau and Whitman, for self-liberation, the search for significant experience, the quest for self-identity. His writing reflects also the new literary forms in art and literature evidenced in the writings of James Joyce and Virginia Woolf, as well as those of the surrealist and Dada schools. These traditions manifest themselves in stream-of-conscience techniques and psychological investigations of the inner world of man. *Tropic of Cancer* is a search by an individual torn between his personal plight and his aspirations for a way to live in society. The anxieties and dilemmas of modern man in quest for a personal reality is one of the principal

social issues of the day. Almost all critics have defended Miller's use of explicit language as essential to his writing, as honest, artistically necessary, realistic and valuable.

Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by Act of Congress and dedicated to the furtherance of literature and the fine arts. The membership of the Institute is limited to 250 citizens qualified by notable achievements in art, literature or music. *Tropic* was Miller's first published work. Since 1934, he has written over 30 books and a score of brochures, pamphlets and miscellaneous material. Miller's critics have come to recognize that Miller's works create a new and optimistic image of twentieth century man. There is a growing realization among those who read Miller's works with critical perception that his writings have an organic unity and substance, that what ultimately derives from Miller's works is a sense of devotion and dedication to self in the service of humanity, to a body of artistic and personal ideals flowing from a particular constellation of talents and compulsions, and that Miller reflects, in a very real and vital way, the history of the age.

Tropic of Cancer by Henry Miller, therefore, is entitled to the protections of the First and Fourteenth Amendments because it is a genuine work of literature which expresses ideas and has an important position in the history and development of literature.

The standards employed by the courts below for judging the alleged obscenity of *Tropic* are unconstitutional. The trial court, upheld by the court below, restricted the witnesses to testify whether or not in their

opinion *Tropic of Cancer* had any value to the "average person" in the "Los Angeles community." A rule of law which provides that a book in the United States can be suppressed if the average person in a local community deems it to be without social importance would reduce the expression of ideas to those that are conventional or shared by a majority, and this Court has repeatedly declared that such a legal rule is contrary to the First Amendment. A standard which permits suppression of books because the average person in a local community deems them socially unimportant is not only unconstitutional but manifestly capricious and socially harmful.

The trial court, again upheld by the court below, also restricted proof with respect to the essential ingredients of the offense to the geographical standards of the Los Angeles community. It is submitted that only a national standard for judging the obscenity of a writing is compatible with the First Amendment requirements, and that the standards of particular state and local communities cannot be constitutionally applicable.

Measured by constitutional standards, *Tropic of Cancer* does not appeal to the prurient interest nor go substantially beyond limits of candor in description of sex in literature. Since this issue involves factual matters entangled in a constitutional claim, the issue is ultimately one for this Court to decide. The dominant theme of *Tropic* appeals to the literary and intellectual interest of the average reader; it does not appeal to a morbid and shameful interest in sex. Nor does the language and sexual language found in *Tropic*, essential and integral to the writing, violate contemporary standards for literature.

Since the Court has coupled this case and the case of *Jacobellis v. Ohio* for argument, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for petitioner briefly discusses the need for re-examination of the basis of the decisions of the Court in the "obscenity" area. Upon critical examination and in the light of the actual workings of the standards enunciated by the Court, it would appear, it is respectfully submitted, that there is need for reconsideration, and that books and other media of communication dealing with sex should have the same rights and be subject to the same limitations which are accredited all other expressions under the Constitution of the United States and the decisions of this Court.

I.

The Book "Tropic of Cancer" by Henry Miller Is Constitutionally Protected Expression and the Provisions of the First and Fourteenth Amendments Safeguard the Sale and Distribution of the Writing Throughout the United States. Imposition of Criminal Sanctions Under the State Obscenity Law Upon Petitioner Herein Is Constitutionally Impermissible.

(a) This argument rests upon the assumption that "'the First Amendment's basic guarantee is of freedom to advocate ideas . . . the very heart of constitutionally protected liberty." *Kingsley International Pictures Corporation v. Regents*, 360 U. S. 684, 688. The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P. v. Button*, 371 U. S.

415, 445. Unless integrated with unlawful conduct, all ideas—"unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—have the full protection of the guaranties of the First Amendment. *Alberts v. California*, 354 U. S. 476, 484.[3]

Thus, this Court has held that it would be a complete repudiation of the philosophy of the Bill of Rights for a State to suppress "the dissemination of views because they are unpopular, annoying or distasteful." *Murdock v. Pennsylvania*, 319 U. S. 105, 116. The Court has stated: "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacement, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 319 U. S. 141, 143. The essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U. S. 296, 310. The "very basis of a free society" is the right of expression "beyond the conventions of the day." Mr. Justice Frankfurter, concurring in *Hannegan v. Esquire*, 327 U. S. 146, 160.

The First Amendment protects literature and the arts because they serve as vehicles for the exposition of ideas, because they "lead the way toward sensitive and informed appreciation and response to the values

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[3]In *Alberts*, a majority of this Court also rejected the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. 354 U. S. at 492, n. 31. See also, *March v. Alabama*, 326 U. S. 501, 511.

out of which the riches of the general welfare are created". Meikeljohn, *The First Amendment is an Absolute*, Supreme Court Review, 245, 257, 262-263 (1961). See, *Alberts v. California*, 354 U. S. 476, 484, 487-488; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954). See also, 5 Social Meaning of Legal Concepts, 34, 36 (1953); Trilling, *The Meaning of a Literary Idea, Aesthetics Today*, 213 (Philipson ed. 1961); Wilson, Axel's Castle, 2 (1931).

Freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society will be permitted to find "his own proper diet." Barzun, *The Arts, The Snobs and the Democrat*, Aesthetics Today, 19 (Philipson ed. 1961). Books contain ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of or insight into the human condition. "From the multitude of competing offerings the public will pick and choose". *Hannegan v. Esquire*, 327 U. S. 146, 158.

The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be freed from "irrational fears". Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 376. "To put the issue as simply as possible: we maintain freedom not in order to indulge error but in order to discover truth, and we know no other way of discovering truth." Commager, *Free Enterprise In Ideas*, The First Freedom, 233 (Am. Library Ass'n, Downs ed. 1960).

It has, of course, been held that "obscenity" is not protected expression, but in a series of decisions the Court has emphasized that in determining where freedom of expression ends and the State's power begins, it is the character of the indispensable rights of mind and spirit under the First Amendment, not of the limitations thereon, which determines what standard governs the choice. *Cf., Thomas v. Collins,* 323 U. S. 516, 529-530; *Speiser v. Randoll,* 357 U. S. 513, 520. See, *Butler v. Michigan,* 352 U. S. 380; *Alberts v. California,* 354 U. S. 476; *Times Film Corp. v. City of Chicago,* 355 U. S. 35, rev'g 244 F. 2d 432 (7th Cir. 1957); *Mounce v. United States,* 355 U. S. 180, rev'g 247 F. 2d 148 (9th Cir. 1957); *One, Inc. v. Olesen,* 355 U. S. 371, rev'g 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U. S. 372, rev'g 249 F. 2d 114 (D. C. Cir. 1957); *Smith v. California,* 361 U. S. 147; *Marcus v. Search Warrants of Property,* 367 U. S. 717; *Manual Enterprises, Inc. v. Day,* 370 U. S. 478; *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58.[4] "But our holding in Roth does not recognize *any* state power to restrict the dissemination of books which are not obscene." *Smith v. California,* 361 U. S. at 152 (emphasis supplied). Such unconstitutional restriction, if recognized, would guarantee the elimination of books of any nature unpalatable to the censor.

(b) Measured by the aforesaid constitutional standards, the book *Tropic of Cancer* by Henry Miller is,

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[4]See also, *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495; *Gelling v. Texas,* 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education of Ohio (Commercial Pictures Corp. v. Regents of N. Y.),* 346 U. S. 587; *Holmby Productions, Inc. v. Vaughn,* 350 U. S. 870; *Kingsley International Pictures Corp. v. Regents,* 360 U. S. 684.

it is submitted, entitled to the First Amendment's protections. It is a serious work of literature, expresses ideas, and occupies an important position in twentieth century literature. Kazin, *Literature*, The Great Ideas Today, 1962 (Cyc. Britannica, Inc. 1962), 146-148; Library of Congress, Guide to the Study of the United States of America, Representative Books Reflecting The Development of American Life and Thought, 131 (1960); Writers at Work, 165-191 (Cowley ed. 1963); The Creative Process (Ghiselin ed. 1952); Kunitz & Haycroft, Twentieth Century Authors, A Bibliographical Dictionary of Modern Literature, 960-961 (1942).

Tropic of Cancer was first published in France by the Obelisk Press in 1934. It was published in Prague in 1938. In 1945 and 1947, two separate editions were published in Paris by French publishers. In 1952, a German edition was published; in 1953 a Danish edition. In 1953 and 1954, an English and Japanese edition, respectively, were published in Tokyo. A Swedish edition was published in 1955. The edition here involved was published by Grove Press, Inc. in New York in 1961. An Italian edition was published in 1962, and an edition in Hebrew was published the same year in Israel. See, Perles, My Friend Henry Miller (1956); University of California at Los Angeles, Special Collections, *Henry Miller Collection*. In 1963, the book was published in England.[5] The British reviewers welcomed the "tardy publication" of the book in their country. Colin MacInnes, *Benevolent Faun*, The Spectator, 437 (April 5, 1963); Frank Kermode, *Jonah*,

[5]Prior to publication, the Attorney General stated that he was not going to institute proceedings under the Obscene Publications Act of 1959 against Messrs. Calder, the publishers. New York Times, Western ed., April 12, 1963, p. 11, col. 4.

New Statesman, 521 (April 12, 1963); Profile, Henry Miller: *Torrents of the Spirit*, The Observer Weekend Review, 24 (March 31, 1963).

A host of American and world figures have attested to the literary and social significance of *Tropic of Cancer*. The list includes, among many other eminent persons, T. S. Eliot, Norman Cousins, Aldous Huxley, Sir Herbert Read, Harry Ashmore, Eugene Burdick, John Ciardi, Wallace Fowlie, Sir Osbert Sitwell, Philip Rahv, Jaques Barzun, Count Keyserling, Ferdinand Leger, J. C. Powys and Edmund Wilson.[6]

In the United States, the Federal Government has conceded that *Tropic* is constitutionally protected by dropping efforts to prevent its importation (*United States v. Three Books, Alleged by the Customs Au-*

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[6]The Special Collections Department of the library of the University of California at Los Angeles, the sixth largest in the country, has the most complete collection of Milleriana in the world. Collected for the most part under the aegis of Lawrence Clark Powell, former head librarian, the Henry Miller Collection consists of letters, magazines, clippings, manuscripts, and related printed material in many languages of, by and about Miller. This includes almost 500 magazines and periodicals from all parts of the world: Belgium, Brazil, Canada, Cyprus, England, Egypt, France, Finland, Germany, Holland, India, Israel, Italy, Ireland, Japan, Mexico, Norway, Philippines, Poland, Russia, Scotland, Spain, Sweden, Switzerland, Tunisia and the United States.

The Collection also includes some 14,000 letters with many noted authors, artists, statesmen, critics and poets. See also, Lawrence Durrell-Henry Miller, A Private Correspondence (1963).

See also, the signatories to a Statement, *Support of the Freedom to Read*, issued after the opinion and ruling of the Hon. Samuel B. Epstein, Chief Judge of the Superior Court of Cook County on February 21, 1962, enjoining local officials from interfering with the sale of the book. *Haiman v. Morris*, No. 615, 19718. The statement and signatures appear in 6 Evergreen Review, July-August, 1962, and are also set forth in Appendix G to the Petition for a Writ of Certiorari filed in this case (Pet. App. 17, 29).

thorities to be obscene, entitled "Tropic of Cancer", "Tropic of Capricorn" and "Plexus", D.C. S.C., 1961), and by lifting the Post Office ban on the book (New York Times, June 14, 1961).

Tropic of Cancer, when published by Grove Press, Inc. in 1961, was distributed with decorous advertising devoted solely to its literary merit. Grove Press, Inc. has published approximately five hundred books. These include fiction and non-fiction—novels, volumes of poetry, plays and works on science, history, criticism, art and music. The works of older, established authors, such as Melville, Twain, and Lawrence, and the works of newer authors, such as Beckett, Behan, Ionesco and Brecht, have been issued to the American public. Among the findings of fact of the court for the Southern District of New York in *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 496 (1959) is the following: "Grove Press is a reputable publisher with a good list which includes a number of distinguished writers and serious works."

Many Grove Press books are in use in colleges and universities throughout the country, having been specifically adopted in various courses by departments and by individual instructors and teachers. Inquiry at the leading universities of the country reveals that "familiarity with the works of Miller is typically part of the general background of the teacher of modern English". Paul and Schwartz, Federal Censorship, Obscenity in the Mails, 128, n. 2 (1961). See also, Richard E. Baxter, Henry Miller: An Evaluation (1953), Master of Arts Thesis, Cornell University; Bosley D. Brotman, Dionysus. A Critical Interpretation of Henry Miller (1951), Master of Arts Thesis, Columbia University;

David W. Griffin. The Possibility of Joy: Henry Miller's Place in the American Tradition (1951), Master of Arts Thesis, Columbia University. Baxter, Henry Miller 195 (1961); University of California at Los Angeles Library, Henry Miller Collection.

When *Tropic of Cancer* was published by Grove Press, Inc. in 1961, the critics and reviewers throughout the country were substantially agreed on the importance of the work. "the first chapter in the 'single, endless, autobiography' that has been his [Miller's] life's work." Maurice Dolbier, *New York Herald Tribune*, June 24, 1961. John Ciardi, The American Poet, observed: "'Tropic of Cancer' must be defended not as an ultimate peak of greatness, but because, whether it succeeds or fails, it is written with power and compassion, and because it is charged in every passage with the author's aesthetic devotion to his form and with his humane devotion of the joy of life. To remove such a book from the experience of mature readers on the grounds that the pru nt may use it abusively is an assault upon the aesthetic experience. It is a denial of freedom on the queasy grounds that men are not fit for freedom. It is to say that the least of men shall dictate the diet of the rest." *Saturday Review*, June 30, 1962.

Ben Ray Redman wrote: "Ezra Pound, T. S. Eliot, George Orwell, and Edmund Wilson have saluted 'Cancer' as a modern classic. Horace Gregory thinks of it as 'Huck Finn in Paris'—an original and provocative conception . . . Sir Herbert Read proclaims it to be 'one of the most significant contributions to the literature of our time' . . . His [Miller's] words on art and artists, the United States, the lockstep of

conformity, Matisse, Dostoevsky, Joyce, Proust, mankind's future, and a score of other topics, keep the reader's mind alert with their challenges". Saturday Review, June 24, 1961.

Eric Moon stated: "With Joyce and Lawrence, he has been a major influence in extending the frontiers of the modern novel, and he has gone much further into enemy territory than either of the other two. . . . It is the lusty, uninhibited song of a man completely happy without illusions. It has humor, anger, art, and sex to saturation point. . . . Miller writes about sex as he writes about everything, the beautiful or the degraded, as an artist and a man who enjoys *all* that goes to make up life and living." Library Journal, June 18, 1961.

Harry T. Moore, writing for the New York Times, asserted: "It might be said of him, as Yeats said of Miller's American forerunners and true masters, Whitman and Emerson, that he lacks the vision of evil in his assertion of self-reliance, in his song of himself. . . . He has been a generally liberating influence upon other writers, for many of his values, particularly his attacks upon standardization and his reverence for life, have been widely circulated and adopted, if only unconsciously." New York Times, Book Review Section, June 18, 1961.

Terry Southern stated: "No one who has read Henry Miller's early work, or who pretends to any information about the history of creative forms, can doubt his absolute formative influence on this aspect of the contemporary scheme . . . [a] work, that is to say, hailed throughout the rest of the word as one of the very first importance, and by an author more wide-

ly read . . . than any American living, other than Upton Sinclair; or any dead, other than Mark Twain and Jack London." The Nation, November 18, 1961.

Dorothy Parker, writing in Esquire (September, 1961), declared: "The book contains, of course, all the short, ugly words that probably roused the fuss. But they are honest words, to be used with respect for their force". John K. Sherman, writing in the Minneapolis Sunday Tribune (June 25, 1961), affirmed; "The great thing about Miller is that he is no whiner but an almost Rabelaisian devourer of life, whose despair has a peculiarly American pulse, exuberance and humor." Gerald Walker, writing in the New York Post (June 18, 1961), stated: "Late or not, let's be grateful. How many great books are there, that we can afford to ignore one of them?"

(c) In the Petition for a Writ of Certiorari herein, petitioner submitted a review of the literary traditions, the nature and character of the arts, and the philosophy which permeated the first half of the twentieth century, out of which the book and its author emerged, as well as a somewhat extended analysis of the book's artistic and ideological form and content (Pet. pp. 12-22). The endeavor was to demonstrate the social importance of the work on its own terms. Petitioner does not cull the same ground again, but presents, in summary, the views there presented.

Henry Miller was in Paris in 1932 when he began writing *Tropic of Cancer*. He was an "expatriate" of the 1930's. Miller was an isolated figure, for on the one hand he was little concerned with the political or social movements of the day, and on the other

hand, by his very rejection of movements and causes, he was compelled to search for fulfillment within himself.

Europe, following the first World War, was artistically and idealogically in despair. A material world seemed bereft of spiritual values, and the worth of the individual appeared unrecognized. As the outer world lost its determinancy over man, Freud and his colleagues stressed the inner world of each individual, emphasizing that it was the content of this inner world which structured external "reality". Surrealist writers and painters, as well as the Dadaists, pointing to the nightmare reality of the subconscious and the dream, sought by their works to shock, and finally remove, the culture which they felt was stultifying the world.

On the other hand, exemplifying the conflicts inherent in the historical situation of the 1920's and 1930's, were such writers as James Joyce and Virginia Woolf. "Reality" to these writers was something more than the subconscious and the dream. An individual's personality had a totality expressed in "consciousness", a term denoting the entire area of mental attention, from subconsciousness on through the levels of the mind up to and including the highest one of rational communicable awareness. The drama of such total inner life was only a part of Reality. Hence, the development of the complex symbolic structures found in the writings of Joyce. See, Humphrey, Stream of Consciousness in the Modern Novel (Univ. of Calif. Press, 1954).

The American literary tradition, no less than the European, is reflected in *Tropic of Cancer*. Writers like Thoreau, Whitman, James, Dreiser, Lewis and

Millay were concerned with self-liberation, the search for significant experience, the quest for self-identity. Miller, with his intuitive and intellectual grasp of European thought, and by dint of his own personality, struggled, sifted, synethesized, and finally emerged, it is submitted, as a voice in the traditions.

As to *Tropic of Cancer* itself, it is not so much the narrative of a man searching for an ultimate identity; it is an account of an individual striving to escape many stereotyped identities which appear to throttle the natural self. It is a search by an individual, torn between his personal plight and his aspirations, for a way to live in society—how to find a voice, to become whole again.

The importance of Miller's search, and the way he struggled to liberate himself in order to find himself, is attested by the fact that the anxieties and dilemmas of modern man in quest for a personal reality is one of the principal social issues of the day. See, Identity and Anxiety (Stein, Vidich and White ed. 1960); Brinton, The Fate of Man (1961); Riesman, The Lonely Crowd (1961); Arendt, The Human Condition (1958); Erickson, Childhood and Society (1950); Fromm, The Sane Society (1955). Individuality can be submerged in mass society with disastrous consequences. On the other hand, it is possible, as *Tropic* suggests, to obtain a personal autonomy if one refuses to ignore or to sentimentalize the pain, the misery, the brutality, the sense of helplessness and the imminence of death that is the lot of many men in this modern age. *Tropic of Cancer* begins with loneliness and death, but it ends with an identification with humanity, and a vision of the acceptance of life through that identification. ". . . a

soil so saturated with the past that however far back the mind roams one can never detach it from its human background . . . I feel this river flowing through me—its past, its ancient soil, the changing climate" (*Tropic of Cancer*, 318).

On the frontispiece of *Tropic of Cancer* is a quotation from Emerson: ". . . if only a man knew how to choose among what he calls his experiences that which is really experience, and how to record truth truly". *Tropic* is the choice of experience by one man seeking ultimately to live without the corruptions and disease of "civilization." Miller made a "descent to the very bowels of the earth, the dark and fearsome journey in the belly of the whale", and engaged in a "bloody struggle to liberate himself, to emerge clean of the past" (*Tropic of Cancer*, 181). Miller does not ask anyone to trod the same path; indeed he furnishes no blueprints nor does he seek any disciples. In writing *Tropic of Cancer*, Miller states: "I found my own voice, liberation, in short".[7] Whether he helps other to find their "voice", is for others to decide.

(d) Almost all critics have defended Miller's use of explicit language as essential to his writing, as honest, artistically necessary, realistic and valuable. Fowlie, *Shadow of Doom: An Essay on Henry Miller*, Accent (Autumn, 1944); Krim, *The Netherworld of Henry Miller*, The Commonweal (October 24, 1952); Muller, *The World of Henry Miller*, 2 Kenyon Review (1940);

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[7]From a letter written by Miller to counsel for petitioner in answer to an inquiry by counsel as to how Miller views the controversy about *Tropic* more than two decades after its publication. The letter appears in the Petition for a Writ of Certiorari (App. J), but for the convenience of the Court it is also annexed hereto as Appendix C.

Huxley, *Death and the Baroque,* Harper's (April 1949). In view of Miller's avowed purpose to penetrate to "the hub of the wheel", he could have hardly expressed the truth of his descent without truthfully depicting the nature and character of the downward path he followed. Probably he "could have omitted" some of the "so-called four-letter words" and the episodes of sex, but "clearly it would not have been the book he planned". *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433, 438-439 (2d Cir. 1960).

Miller is giving a picture of the "lost generation" of the 1930's in Paris. It is not a pretty picture, but it is not a world which Miller made. He does not give us some dry account of that historical period. He transplants us directly into that life, showing us characters and living figures.[8] They were dissolute, and he depicts their dissoluteness, as well as his own. If the language they used was coarse it was because coarse speech was utilized by the human beings who flocked together in the netherworld of Paris in the 1930's. ". . . many people in London, Berlin, Rome, New York and San Francisco are living today what Miller experienced 20 years ago". Krim, *The Netherworld of Henry Miller,* The Commonweal 70 (October 24, 1952).[9] While Miller has been influenced by D. H.

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[8]See, for an artistic representation of the "denizens of Montmartre," at the turn of the century, Toulouse-Lautrec (Harry N. Abrams, Inc. 1956), especially at 63 "Fat Maria"; 107, "The Kiss"; 116, "Rue des Moulins: The Inspection"; 120, "Friends."

[9]". . . The poet is no teacher of morals; he invents and creates characters, he brings the past back to life, and from this people may learn as though from the study of history itself and the observation of it, what happens in human life around them. If one objects to this reasoning, then he ought not to study history at all because a great many immoral things hap-

Lawrence, and like Lawrence, feels that some of the world's troubles are derived from a lack of a healthy attitude towards sex. Miller, unlike Lawrence, is not an evangalist of sex. Miller's world is multi-faceted. By presenting, however, the images of sex of the most mechanical and unloving nature, Miller shows what sex can be when it is not integrated in the total man. In so doing, he renders an important service. "Sex is almost as completely a private a matter as death, and a work of art which powerfully expresses the truth about either of them is very painful to the respectable public figure we imagine ourselves to be. Nobody can have the consolations of religion or philosophy unless he has first experienced their desolations. And nothing is more desolating than a thorough knowledge of the private self. Hence, the utility of such works as Tolstoy's *Ivan Ilyitch* and, I would venture to add, such books as Henry Miller's *Tropic of Cancer*". Aldous Huxley, *Death and the Baroque*, Harper's 84 (April, 1949).

(e) Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by act of Congress in 1913, dedicated to the furtherance of literature and the fine arts. "Its membership is limited to 250 native or naturalized citizens qualified by notable achievements in art, literature or music." See, *Information Please Almanac* (1963) 220-221, setting forth the complete list of distinguished members.

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pens therein; he should have to go blindfold down the street, for he might otherwise be compelled to see certain indecencies; he should have to cry shame on God for having created a world which gives rise to so much dissoluteness. Furthermore, if someone should say to me that the poet ought not to show the world as it is, but as it ought to be, then I would answer him that I will not make it better than the good Lord, who must certainly have made it as it ought to be. . . ." (Letters of Gorg Buchner (July 1835, to his family).

including members of the Academy of Arts and Sciences, an affiliate of the Institute.

Tropic was Miller's first published work. Since 1934, he has written over thirty books, and a score of brochures, pamphlets and miscellaneous material. See The Henry Miller Reader, 395-397 (Durrell ed. 1959); Baxter, Henry Miller, Expatriate, 191-201 (1961). Annexed hereto as Appendix D is a selected bibliography.

Miller's critics have come to recognize that Miller's works create a new and optimistic image of twentieth century man. In an age caught up with frustrating issues of political, social and economic reform, Miller's anti-institutionalism, his cry for self-liberation, his commitment to a personal identity regardless of environment definitions, have brought increasing respect for his outlook, as well as continued criticism.

Because the social and philosophical aspects of Miller's writing were unsatisfying to the critics of the 1930's, his early admirers emphasized his characteristic American expatriate behavior. Edmund Wilson described him as "the spokesman, par excellence, for the Left Bank". Wilson, *Twilight of the Expatriate*, New Republic, 707 (March 9, 1938). By the 1940's, the political disillusion of the artists and intellectuals manifested itself in a more critical examination of Miller's philosophy. "As an artist, he must not sacrifice his individuality for the sake of some blatantly abstract and artificial ideal like the brotherhood of man. He must believe himself at all costs. That is why Miller is opposed to revolutions. In the end they involve a return to the status quo, and the artist, the uncompromising revolutionary, is against the status quo at all times". Glicksburg, Henry Miller: *Individualism in*

Extremis, The Southwest Review 290 (Summer 1948). George Orwell, on the other hand, while a great admirer of Miller, accused him of being passive and accepting, while recognizing the world's ills. "There you are, in the dark, cushioned space that exactly fits you, with yards of blubber between yourself and reality, able to keep up an attitude of the completest indifference, no matter what happens." Orwell, *Inside the Whale*, in a collection of essays of the same name 177-178 (Lond. 1940). But this womb-like existence which Orwell protested, other critics saw as a movement towards rebirth. "He [Miller] was forced to take residence in a strange world. He was forced to take that world apart in order to understand it. . . . He could only reach a state of true objectivity by becoming completely subjective, letting all experiences filter through him, whatever the outcome". Leites, *The Autochton*, Penguins 140 (1945).

Later criticism of Miller has recognized a "moral-aesthetic" creed, and passionate commitment to a vision of a universal democratic Man. ". . . in Miller's work persons and places are always transmuted by the particular moral intensity with which he contemplates them". Parkinson, *The Hilarity of Henry Miller*, The Listener, 1021 (June 19, 1958). ". . . the essential American in Miller was the potential reformer whose ruthless exposure of the sins of his native society implied a profound devotion to its ideals". Baxter, Henry Miller, Expatriate, 174 (1961). Critics have dwelt on Miller both in terms of his affirmations and in terms of his special significance for the reader. "Having found life within himself, he can point the way of life to others. By the force of his example, by the vitality

he radiates, the emotional release he effects, he serves as a leaven to stir to life the inert mass of humanity". Fraenkel, The Genesis of the Tropic of Cancer 6 (1946).

In sum, there is a growing realization among those who read Miller's works with critical perception, that his writings have an organic unity and substance, that what ultimately derives from Miller's works is a sense of devotion and dedication to self in the service of humanity, to a body of artistic and personal ideals flowing from a particular constellation of talents and compulsions, and that Miller reflects, in a very real and vital way, the history of the age.

It is submitted, therefore, in the light of all the aforesaid, that *Tropic of Cancer* by Henry Miller is a genuine work of literature which expresses ideas, and has an important position in the history and development of literature.

Petitioner, in concluding this discussion, considers it gratuitous to urge upon this Court at length the social and political consequences of censorship and suppression of writings. More than humanitarian and libertarian issues are involved whenever books are destroyed, as a long and tragic history reveals. Craig, Suppressed Books (1963). See also, Starkie, Baudelaire, 307-327 (New Directions, 1958). "Government and society have a paramount interest in independence, originality, heterodoxy, criticism, nonconformity, because all experience teaches that it is out of these that come new ideas, and because every society needs a continuous reexamination of old ideas and a continuous flow of new ideas". Commager, *Free Enterprise In Ideas* in The First Freedom, 235 (Am. Library Ass'n 1960).

Until the decision of Judge Woolsey in 1933, one of the foremost literary works of the twentieth century was deemed "obscene". *United States v. One Book Called "Ulysses"*, 5 F. Supp. 183 (S. D. N. Y.). While affirming the judgment of the District Court, Judge Augustus Hand stated in his opinion: "We may discount the laudation of Ulysses by some of its admirers and reject the view that it will permanently stand among the great works of literature. . . . It may be that Ulysses will not last as a substantial contribution to literature, . . ." 72 F. 2d 705, 706, 708 (2d Cir. 1934).

But, with all deference, the book does "stand" three decades later, and Ireland, Joyce's homeland from which he fled [See, Ellman, Joyce (1959)], today honors his memory with a Museum dedicated to the author. New York Times, June 15, 1962, page 29.[10] Aside from the anomoly that found so many persons certain that Ulysses was "obscene" just one day before Judge Woolsey's decision, and equally certain that the book was not obscene a day later, one is moved to ponder whether posthumous honors awarded to an artist maligned while he was alive does not compound the injury.

If there are those who deem Henry Miller's *Tropic of Cancer* to be "obscene" or without "social importance", the answer must be, it is submitted, to "let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where

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[10]At the dedication ceremonies in Dublin, Charles Haughey, Minister for Justice, responsible for enforcing the Irish Censorship Law, and Rev. Donal O'Sullivan, a Jesuit, director of the Irish Arts Council, were present. N.Y. Times, June 16, 1962, p. 80, col. 1.

reason is left free to combat it" (Jefferson, First Inaugural Address). The request here is not for a "seal of approval"; it is only for a ruling by the Court that the protection of the Constitution of the United States exists for the book *Tropic of Cancer*, and forbids the imposition of criminal sanctions upon those who distribute and sell the book to the public.

II.

The Statute, as Construed and Applied by the Courts Below, Deprives Petitioner of Liberty of Speech and Press Without Due Process of Law Contrary to the Free Speech and Press Provisions of the First and Fourteenth Amendments. The Judgment of Conviction Rests Upon the Use of Unconstitutional Standards for Judging the Alleged Obscenity of the Writing.

(a) As the Statement of the case herein indicates, the trial court, upheld by the court below, ruled that the state obscenity statute should be construed as removing the protection of the First Amendment from any writing which *the average person* deems utterly without social importance. The jury was instructed to this effect, and throughout the trial the witnesses were restricted to testifying whether or not in their opinion *Tropic of Cancer* had any value to the "average person" in the local community. The jury was thus left free to convict petitioner if in the jury's judgment the average person in Los Angeles would find Henry Miller's *Tropic of Cancer* to be without social importance.

One example from the record will exemplify the method used at the trial to judge the "obscenity" of the writing. The following is a colloquy between a

prosecution witness, Dr. Howard S. McDonald [R. 912] and the prosecutor:

> "Q. Sir, when you stated that you saw no socially redeemable value in Tropic of Cancer, you were referring to the average person in society, is that correct? A. That is correct. Not the—
>
> Q. Sophisticated or the worldly way? A. Either way, the people on either side. We are talking about what is described here, the average person—to the average person.
>
> Q. I see. A. That's what we are talking about here." [R. 946].

It is doubtful, it is submitted, that the standard employed by the courts below as aforestated leaves much "breathing space" for First Amendment freedoms to survive. *N.A.A.C.P. v. Button,* 371 U. S. 415, 433. Such a rule with respect to books allows the subjective prejudices of a jury the power to intrude upon the protected area. In view of the continued activities of private censorial groups in local communities, and the extreme pressures used to suppress all writings offensive to the philosophical, religious, moral or political views of such groups and local prosecutors, local juries would be under considerable compulsion, if they were not otherwise willing, to suppress a large body of literature deemed by the jury of no social importance to the "average person". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 6-9. See also, *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58; *Times Film Corporation v. City of Chicago,* 365 U. S. 43, 69-73.

But it cannot be the rule, it is submitted, that a book in the United States can be suppressed if the "average

person" in the community believes it to be without social value. "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them." Lockhart and McClure, *supra*, at 114. The man who suggested that if all mankind "minus one" were of one opinion, mankind would have no right to silence that opinion, also stated:

> "Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. . . . Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, *ought to be considered precious*, with whatever amount of error and confusion that truth may be blended."
>
> John Stuart Mill, On Liberty 31 (McCallum ed. 1946) (emphasis supplied).

This Court has stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority".

Kingsley International Pictures Corporation v. Regents, 360 U. S. 684, 689. "Men are entitled to speak as they please on matters vital to them; . . . Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood v. Georgia*, 370 U. S. 375, 389. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319, U. S. 624, 641-642. History has amply proved the virtue of "minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society". *Sweezy v. New Hampshire*, 354 U. S. 234, 251. See also, Milton, Areopagitica 389-391, 397-399 (Great Books ed.); Madison, *Report on the Virginia Resolutions* in Elliott's Debates 569-571 (1907 ed.); Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson, 438-441 (Fed. ed.); Chafee, Free Speech in the United States 33 (1941); Commager, Freedom Loyalty Dissent 14-15 (1954).

A standard which permits suppression of books because the average person deems it socially unimportant is therefore not only unconstitutional, but manifestly capricious and socially harmful. The observation of Judge Hand in the *Ulysses* opinion (72 F. 2d at 708) should be recalled: "The foolish judgments of Judge Eldon about one hundred years ago, proscribing the

works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mob' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

(b) The trial court, upheld by the court below, also restricted proof with respect to the essential ingredients of the offense to the standards of the "Los Angeles" community.

Professors Lockhart and McClure have expressed the view that only a national standard for judging the obscenity of a writing is compatible with First Amendment requirements, that the "standards of particular state and local communities are not constitutionally applicable". [*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 1, 112 (1960)]. This view is predicated upon the premises, in summary, that adoption of local standards leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon books and art and other media of communication; that such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; that the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; that such narrow construction results in the citizens of one part of the country enjoying the right to read literature denied capriciously to citizens of another part of the country; and that the use of "local

standards" subverts the function of appellate courts, required to apply First Amendment standards, by intruding conflicting standards imposed by a local community. 45 Minn. L. Rev., at 108-114.

If the constitutional protection afforded writings is to be determined by applying "contemporary community standards," by invoking the "common conscience of the community", then at the very least, it is submitted, the community to decide that a book is not entitled to constitutional protection should be the national community. This should be the minimal guarantee of the First Amendment protection if freedom of expression is not to be eroded.

Since *Roth-Alberts* "(. . . vital that the standards for judging obscenity safeguard the protection of freedoms of speech and press . . ." 354 U. S., at 488), this Court has constantly admonished that the standards to be applied in this area must be carefully circumscribed so as not to restrict "the public's access to forms of the printed word". *Smith v. California*, 361 U. S. 147, 154). The "evident purpose" of *Roth* was "to tighten obscenity standards" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487), and "we risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than the standards whereby it is judged" (*Id.*, at 497). "Thus, the Fourteenth Amendment requires that the regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging

yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66.

Petitioner submits that the resolution of the issue here involved depends upon a "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520) of the method of limiting freedom of expression by local literary and psychological standards. The "angle of vision", it is submitted, should be the broad, indispensable character of freedom of speech and press under the First Amendment—not the nature of the limitation upon these fundamental liberties.

Such a scrutiny would at least reveal that the Court has uniformly held that the freedom of speech and press secured by the First Amendment is equally secured, in breadth and scope, by the Fourteenth Amendment. Thus, a writing protected by the First Amendment is protected from state suppression by the Fourteenth Amendment. Could a local jury applying "local standards" find a bookseller guilty of selling a book which this Court had held to be constitutionally protected under the First Amendment? The answer, it is submitted, must be clearly in the negative.

It is no interference with the State's power to enforce obscenity laws to hold that the trier of the facts must apply national standards. What is inherently involved in any obscenity prosecution is whether the writing is entitled to First Amendment protection. First Amendment protection means the protection which the Constitution of the "United States" provides; the protection is national in scope. Moreover, it is protection for freedom of the mind and spirit; not the sale of pots and pans to the local householder. *Cf., Smith v. California*, 361 U. S. 147, 152-153.

A local jury which authorizes the suppression of a book that the people of the country would not authorize "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642.[11] The reason why *no* State can compel a flag salute today is because the national standard of freedom of expression embodied in the First Amendment forbids it. The standard for destroying a book should be no less. See *Talley v. California*, 362 U. S. 60, 64-65.

(c) Measured by constitutional standards, *Tropic of Cancer* does not appeal to the prurient interest or go substantially beyond limits of candor in the description of sex in literature. This issue, "involving factual matters entangled in a constitutional claim" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488), is ultimately for this Court to decide.

It is submitted that *Tropic of Cancer*, considered as a whole, is not a book whose predominant appeal is to prurient interest. It is a work that expresses ideas, a work of literary merit, and a book that occupies an important place in the history of literature. The domi-

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[11]The necessary proof in obscenity prosecutions on the issue of "contemporary standards," if First Amendment requirements are to be met, is of a two-fold character: first, that the book goes beyond the standards of the local community; in addition, that the book goes beyond the standards of the country as a whole. *Cf., In re Mayall's Naturalization*, 154 F. Supp. 556, 560-561 (D.C. E.D. Pa. 1957), opinion by Chief Judge Ganey; *In re Naturalization of Spak*, 164 F. Supp. 257, 259-260 (D.C. E.D. Pa. 1958). Of course, the power of a local community to permit a broader exercise of freedom of speech and press than even the First Amendment assumedly protects, is undisputed. *Cf., State of Nebraska v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959).

nant theme of the writing appeals to the literary and intellectual interest; it does not appeal to a "morbid and shameful" interest in sex.

Nor do the language and sexual descriptions found in *Tropic*, essential and integral to the writing, violate contemporary standards for literature. Many recent works of conceded merit, by reputable authors, openly sold and published, are equally frank in language and description of sexual activity. Among others are at least two books—Joyce's "Ulysses" and Lawrence's "Lady Chatterley's Lover"—which, although detailed in their descriptions of sexual activity, have been judicially declared not to be obscene. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S. D. N. Y. 1933), aff'd 72 F. 2d 705 (2d Cir. 1934); *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), aff'd 276 F. 2d 433 (2d Cir. 1959).

See also, Lockhart and McClure, *supra*: "If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression." 45 Minn. L. Rev., at 119. See also, the argument under Point I herein.

(d) Since the Court has ordered that the case of *Jacobellis v. Ohio*, argued last term (No. 164), be restored for reargument this term together with the case herein, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for petitioner, with due deference, believe that this Court will welcome some brief discussion on the need for re-examination of the "developing constitutional standards" [Lockhart and McClure, 45 Minn. L. Rev. 5

(1960)]? as enunciated in *Roth* and in the subsequent decisions. We note that *amici*, in some instances, have urged such reconsideration, and we join in such request. "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U. S. 649, 665.

The basic assumptions in *Alberts* upon which the majority opinion rested were that freedom of expression under the First Amendment is not absolute; that there appeared to be a universal judgment as expressed in international agreements and the laws of Congress and the States that "obscenity" should be restrained; that obscenity is "utterly without redeeming social importance"; and that "obscene" material is therefore not within the area of constitutionally protected speech or press.

It is respectfully submitted that the aforesaid assumptions require critical re-examination. Their statement in *Alberts* perhaps served as an introduction to the real problems, but they have been unfortunately treated by the lower courts, the censors and extra-legal censors, as determinative of all First Amendment issues.

It is unnecessary, it is submitted, to canvas the merits of the "absolute" and "balancing" arguments. See *Barenblatt v. United States*, 360 U. S. 109; Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). It may be conceded for purposes of argument that freedom of expression is not absolute, as for example when speech is integrated with unlawful conduct. But the problem is of drawing the line between the exercise of freedom and the limitations thereon.

How shall the line be drawn? It is submitted that such question is not answered, as many courts and "citizens committees" appear to believe, by advancing the assertion that freedom is not "absolute".[12]

The other initial assumptions in *Alberts* suffer, it is submitted, from a specific difficulty—they assume common agreement on a definition of "obscenity" when as a matter of fact there is none. As Lockhart and McClure point out, there never has been an international agreement on the definition of obscenity. *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 323 (1954). A "universal judgment" that expression should be restrained without agreement in what the area of expression so to be limited, is, can hardly be deemed a weighty reason for restrictions on freedom of expression in the United States. This appears especially true when it is considered that many countries are concerned with "obscenity" only as it connotes attacks on state religions. Moreover, the history of federal and state legislation shows that these laws derive either from the comstockery of the 19th century or from laws principally concerned with blasphemy or other "impious libels". See Judge Frank's opinion in *United States v. Roth*, 237 F. 2d 796, 806-810; Kalven, *The Metaphysics of the Law of Obscenity*, Supreme Court Review 9 (1960). To place reliance upon the views of foreign countries, many without written constitutions, and upon laws in this country based on prem-

[12]"That liberty is not absolute is one of those truisms that is always brought out and put to work whenever somebody wants to censor a book or a film that he doesn't like, or to throw a teacher or a librarian or a radio performer out of his job." Commager, *Free Enterprise in Ideas*, The First Amendment 231 (Am. Library Ass'n 1960).

ises no longer acceptable under the Constitution and the First Amendment, as interpreted by this Court, appears, it is submited, unsubstantial.

The notion that an utterance deemed "utterly without social importance" is *ipso facto* deprived of constitutional protection, deserves the most critical examination because of the serious First Amendment implications involved. There does not appear to be any area of protected speech except discussion of sex which is chained with such an ambiguous concept. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too illusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U. S. 507, 510. An utterance calling for equality of treatment without regard to race may appear utterly without social importance to a southern community, but its protection under the

First Amendment cannot be doubted. *Edwards v. South Carolina*, 372 U. S. 229.

The standards for judging obscenity which the Court has enunciated do not appear to safeguard the freedoms of speech and press protected from all governmental infringement under the Constitution.[13] One ingredient, to wit, that the dominant theme of the material taken as a whole "appeals to prurient interest" has been the source of considerable confusion and the basis for unjustified invasions of freedom of expression. The difficulty lies principally in the meaning of the words "prurient interest." Very few persons, including psychologists, appear to know what these words mean. In *Alberts*, this Court noted that pruriency has been defined as "quality of being prurient; lascivious desire or thought." The American Law Institute has defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."

None of these definitions have proved to be workable. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959); *State v. Jackson*, 224 Ore. 337, 365-379, 356 P. 2d 495, 508-515 (dissenting opinion of Justice O'Connell). They are tautological, subjective and imprecise. They serve only to feed the prejudice of the trier of the facts and enable courts and juries to suppress writings on no other basis than the talismanic labels. If anything can be distilled from the aforesaid terms, it is that writings which cause sexual de-

[13]Our discussion here is concerned with the right of the average, normal adult to read a book dealing with sex. We believe a different category of constitutional problems are presented when a narrowly drawn statute specifically limited to the distribution of writings to children is involved.

sires or sexual thoughts may be suppressed. If this be the intendment of the "prurient interest" standard, then at least two difficulties are presented: the first, that in no other area of speech and press has it ever been accepted by this Court that utterances may be interdicted because they arouse thoughts and desires; second, if books are to be suppressed because they may arouse a sexual desire or a sexual thought, it is much to be feared that a great many libraries will be deprived of most of their contents, including the recent library assembled for the White House by a distinguished group of scholars.

Mr. Justice Harlan, in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, suggested that the unseemliness of utterances could not be deemed obscene unless, in addition, the utterances were shown to have a "likely corruptive effect." (*Id.* at 484-487). While such view may appear at first glance to tighten the definition, it must be stated with deference that the "corruptive effect" concept is also far from a satisfactory solution of the constitutional problem. Aside from the complex question involved in determining whether an average normal adult with his or her particular background can ever be "corrupted" solely by the reading of a book to the point of becoming changed in character and outlook, there remains the problem of whether or not writings can be suppressed under the First Amendment solely because some judge or jury may believe that a reading of the work will cause the average normal adult to begin to change from Dr. Jekyll to Mr. Hyde.

With respect to the ingredient, "contemporary community standards," and "the common conscience of the

community," we find here again the difficulty of determining what national standards are or what is meant by "common conscience of the community," and also the constitutional objection that the writing of a dissenting voice should not be suppressed because the community does not like it. Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Mr. Justice Jackson also stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Id.*, at 642).

It also appears plain today that the standards for the protection of freedom of expression under the First and Fourteenth Amendments will not be safeguarded by resort to the "hard core pornography" test. While this phrase may have evoked a particular image of restricted material in the mind of the Solicitor General, who briefed the argument in *Alberts*, it appears clear that the same image does not exist in the minds of many lower courts, and in those censorial groups who now patrol all outlets engaged in the circulation of the press. As the majority opinion in the recent decision by the New York Court of Appeals in *People v. Fritch*, ... N. Y. 2d ....., 6 N. E. 2d ....., reveals,

the words "hard core pornography" are nothing more than words, and the "hard core pornography" test is nothing more than a vehicle for suppressing freedom of expression.

This Court can observe, it is submitted, from a reading of Judge Scileppi's opinion in *Fritch* that the standards for judging obscenity enunciated in *Alberts* have become nothing more than labels, and this Court's repudiation of the *Hicklin* doctrine is grievously ignored in that opinion. It is not uncommon today for private censorial groups in the community in similar manner to send through the mails excerpts torn out of context from a book urging recipients to fight "smut" on the basis of such excerpts.[14]

It is respectfully submitted that no "compelling interest" has been advanced to justify the treatment of writings dealing with sex as *sui generis* and outside the pale of constitutional protection. Insofar as such writings oppose the moral or ethical standards of the day, they would appear to have the same right to protection as any other writing which attacks accepted conventions. Insofar as such writings create sexual thoughts or sexual desires, they deserve protection

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[14]For example, the "California Citizens for Decent Literature" has sent through the mails a letter directed generally to the public asking for financial contributions to fight "pornography" and enclosing in a sealed envelope an excerpt from *Tropic* the same as the excerpt contained in Judge Scileppi's New York Court of Appeals opinion. See, Los Angeles Times, August 2, 1963, article by Paul Coates.

The Brooklyn New York Tablet of July 18, 1963 reports that a similar group, "Operation Yorkville," made a major contribution to the outcome of the case in New York. It is stated: "For nine months, Operation Yorkville and other area 'Operations' begun by the group, have sent the Court of Appeals thousands of letters and cards expressing community standards."

nevertheless just as much as writings which arouse political, economic, social or other related desires and thoughts. There does not appear to be any reason why books and other media of communication dealing with sex should not have the same rights and the same limitations as are accorded all other expressions under the Constitution of the United States and the decisions of this Court. There are ample laws available and ample power available for the States to deal with sexual misconduct without invading the area of protected expression. To enforce the provisions of the Constitution is not to weaken the power of the federal government or the power of the States. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

Of Counsel:
SAM ROSENWEIN

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant — Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant — A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent — Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P. C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers the question of constitutionality or whether the book was "utterly without redeeming social importance" with-

in the definition of P. C. §311(a). Of course, the jury makes no specific finding of constitutionality, but the trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance"; a finding amply supported by respondent's expert witnesses. With this finding we must agree, since, as we stated in *People v. Harris* (1961), 192 Cal. App. 2d Supp. 887, 894; "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U. S. 476, 490, 1 L. ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra,* p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is. . . ."

The recent case, *People v. Williamson* (1962), 207 A. C. A. 885, 888, held that ". . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 880, stated: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], apply-

ing contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra,* quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P. C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p. 12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U. S. 35, 2 L. ed. 2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U. S. 372, 2 L. ed. 2d 352; *One, Inc. v. Oleson* (1958), 355 U. S. 371, 2 L. ed. 2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N. Y.* (1959) 360 U. S. 684, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L. ed. 2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N. E. 2d at 200, and to the scope of the applicable

New York law, and stated: "The opinion . . ., as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L. ed. 2d, Justice Harlan said: ". . . I have viewed this film"): *Manual Enterprises, Inc. v. Day* ..... U. S. ....., 8 L. ed. 2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U. S. Supreme Court, except for Justice Harlan, in the *Roth* case (1957) 354 U. S. 476, 1 L. ed. 2d 1498, 1509, 1514. From the reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous relationships with Paris street women and others, whom he frankly and appropriately terms "whores",

as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his selfincrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, *i.e.*, a shameful or morbid interest in nudity sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P. C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so; so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 1 L. ed. 2d 1498, states that "ideas having even the slightest redeeming social importance . . .

have the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: "unless excludable because they encroach upon the limited area of more important interests." (p. 484 U. S., 1507 L. ed. 2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: "The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696. . . ." (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal. App. 2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal. App. 2d 377, 380-1. See also 29 Cal. Jur. 2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

HULS,
Judge.

I concur:

SWAIN
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for the purpose of

appealing to the nonliterary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

SMITH
Judge

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechan-

ical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

APPENDIX C.

Letter of Henry Miller.

Big Sur, California
Dec. 26th, 1962

Stanley Fleishman, Esq.,
1680 Vine Street—Suite 700,
Hollywood (28) California,

Dear Stanley:

At your suggestion I am setting down some of my views concerning the *Tropic of Cancer* case, which I understand is on its way to the highest court of the land.

Tropic of Cancer was begun in Paris, not Brooklyn, when I was in my fortieth year. I had already been married twice and was the father of a child. I had begun writing almost ten years before, with no success whatsoever. I left New York, my birthplace, in the early part of 1930, determined to begin life anew. In 1928, due to a freak of fortune, my wife and I traveled about in Europe several months. The impressions received during this trip abroad convinced me that if I were to continue my career as writer Europe was a better place for me to do it than America. Somehow I did not fit into the American scheme of things. From the time I graduated from High School until I decided to become a writer I must have had a hundred different jobs. I quit the last one—employment manager of the messenger department of the Western Union Telegraph Co.—resolved never to look for a job again but to live or die as a writer. That was in September 1924. *Tropic of Cancer* was published in Paris in September 1934. During this ten year period I had

written three books and any number of short stories and articles. To the best of my knowledge only two or three of the latter—none of the books—were ever published. You can imagine that it was in something like a state of desperation that I resolved to try my luck abroad.

I had imagined on leaving America that I was going to Spain, but I never got farther than Paris. I arrived there in the Spring of 1930, knowing nothing of the French language. While writing the *Tropic of Cancer* I was obliged to live by my wits, as the book sets forth. The difficulties I had experienced in pursuing the career of writer prior to leaving America were considerably augmented, to put it mildly, on arriving in France. Looking back on it all I must confess, however, that it was more enriching and instructive starving in Paris than in my home town. Thanks to the aid and encouragement of the friends I made—largely expatriates like myself—I managed to survive and finish the book. It was something of a miracle that I found there in Paris the one publisher in all the world courageous enough to sponsor such a book: Jack Kahane of the Obelisk Press. Between the time he accepted the book and its publication I rewrote the book three times.

I have often referred to this work as an ice-breaker. In writing it I found my own voice, liberation, in short. This was due, undoubtedly, to the life I led, by which I mean not only the struggles and hardships of keeping alive in a foreign land but also as a result of a growing acquaintance with French literature, the French way of life, and the acceptance accorded me by French writers. Unwittingly I found myself living

that "bohemian" life which so many celebrated writers and artists before me had been obliged to live for one reason or another. My book might be regarded, I suppose, as a celebration of that splendidly miserable kind of life. In writing it, I ought to add, I had almost no hope of its ever being accepted by a publisher. It was something I had to do in order to preserve my own integrity. It was a case of do or die. Certainly the last thing I ever dreamed of was that it would one day be published in my own country.

Perhaps it is not a "pleasant" book. It has proved, however, to be an "instructive" one—for those who know how to read it. Of that I have had much interesting testimony during the years following its publication. In the files of the library at U.C.L.A. are thousands of letters from readers of the book all over the world. The burden of most of these testimonials is that the book had a liberating effect, that it inspired hope and courage, the courage to live one's own life, come what may. It had this effect, I presume, because it is a naked, vivid account of one man's struggles with almost insuperable odds, because it is a revelatory account of this man's life, sparing nothing. Many of these readers confessed that it was the first time in all their reading experience that the whole man had been portrayed. They saluted the author as one who had restored a new kind of integrity to literature, to *our* literature, at least.

The truth of these assertions I myself discovered later when I began to investigate the emasculative process which Anglo-Saxon literature has undergone these last few hundred years. With the tremendous upheavals which the second world war brought about it became

more than ever obvious to me, and others, that our literature was not rendering a true picture of the known behavior, sexual behavior particularly, of the citizens of the Western world. Some measure of freedom had been gained perhaps, though this is not always clear, but certainly not freedom of expression in literature

Perhaps my book would have died a normal death had it not been discovered and touted by the American and British troops stationed abroad during and after the war. I am thinking here not only of the forces in Europe, but in Asia and Africa also. (In China alone, I have been told, over 100,000 copies—pirated editions— were sold.) With the end of the war the book went into a number of translations, including French, German, Czech, Swedish, Danish, Spanish, Portuguese, Japanese, Dutch, Finnish, Hebrew, Italian. In the countries where the book has been permitted to be sold and distributed openly it has been read and accepted by the public at large, not simply by cliques and cultists as was the case in America during the years it was banned here. I have never heard, incidentally, that the reading of the book brought about a general demoralization or an increase in crimes of a sexual nature. In all these countries, moreover, the foremost critics of the land usually hailed the work as an important contribution to literature. In my own country, because of this book and others of like nature which followed, I was elected to membership in the National Academy of Arts & Letters. This before the ban on these books had been abolished.

Certainly this book has provoked attention and discussion wherever it has been published. In every country there are those who believe that the author went

too far, that certain things may be said but not written and so on. The intensity of these discussions varies with the habits and traditions of the citizens of the various countries. Back in 1953, when I was asked to appear before the Juge d'Instruction in Paris in connection with the book *Sexus,* the judge finally asked me if I believed in complete freedom of expression. And I answered Yes. I cannot imagine a writer sitting down and saying to himself: "I think I will permit myself to say this but not that." I know, of course, that there are plenty of writers who endeavor to cater to the public's taste and who, in so doing, have an eye on the market. These men I do not regard as writers. A serious, dedicated writer is in my opinion, a man who stands behind every word he puts down and who does not impose restrictions on himself for fear of incurring public disfavor. He writes because he has the urge, because he can do no other. True, in every period there are only a few such individuals, but it is my belief that it is only these few who contribute anything of value to literature, who nourish the love of letters.

In my youth my idols, among American authors, were such as Thoreau, Emerson, Walt Whitman; they still are, I should add. I regard them as revolutionary spirits, men who were against the trend of the times. Perhaps I was drawn to such writers because I am myself a born rebel. To-day, my birthday, I am seventy one years old—and still a rebel. A rebel who has learned, as St. Francis of Assisi put it, "not to try to change the world, but to change worlds."

To come back to the free spirits . . . If they had been obliged to write down to the level of the "normal

community standard", as the phrase runs, would we have to-day the words which made them famous? Why should any thinker, in any field, be required to make his thoughts palatable and acceptable to the ordinary citizen? As a member of a great community which boasts of the exceptional freedom its citizens are permitted to enjoy, it seems to me that this question is not out of place. Years ago, when reading a work of Wassermann's called *The Maurizius Case*, I copied out a long passage from the mouth of one of his characters. It began something like this . . . "When I utter the word Europe I think of . . ." and here he proceeds to name the illustrious guiding spirits which laid the foundation of our civilization: poets, novelists, artists, thinkers, scientists, philosophers, religious leaders and so on. An exciting list, truly, since it embraced all those who made the Europe which has influenced us and the world. Reading this roster one cannot but be impressed with the number of leading spirits who, in giving of their best, were maligned, slandered, persecuted, imprisoned, tortured, executed, burned at the stake, anathematized. It would almost seem as if those who fought and died to insure our freedom, especially freedom of thought, were looked upon not only as enemies of society but as monsters.

The question in my mind is not how far one should be permitted to go in expressing oneself freely but how great is the gap, and how dangerous for the future of mankind, between the daring inspired by conviction and integrity and the conformity based upon inertia, stupidity, cowardice and hypocrisy? Are we here on earth to live like sheep, live in the herd, or to follow our own bent, our own conscience? Should we be fear-

ful of revolutionary thinking or welcome it? Should we act as our fathers and forefathers or as free and individually unique beings? And finally, is freedom itself to be interpreted and circumscribed by the few, the many, or by each man for himself?

Much has been said, during the course of the many trials which this book has provoked, of the danger to society, particularly to the young, which free circulation of the book involves. No one, to my knowledge, has yet pointed out a single instance where such has been the effect. And the book has had so far well over a million readers. We do know, on the other hand, the disastrous effects upon adults as well as young people of drugs, tobacco, alcoholic beverages, weapons, even automobiles. Is it possible that we can adapt to certain hazards and not others? Are certain words and expressions, even though commonly used, not to be employed in writing? Do they really constitute such a dangerous menace? Or is it not simply a matter of overcoming one more built in prejudice? We all know that when it comes to the classics a liberal use of what is called obscenity may be found. On what presumption is the freedom to read the classics permitted? Is time the test? If so, what hope is there of obtaining new classics?

I use the word classics deliberately. I regard *Tropic of Cancer* as such, a classic. Despite all that has been said against it, despite all the efforts to suppress it, it continues to make its way, to find more and more readers. It is now almost thirty years since its first publication, in Paris. It is still in its infancy, one might say. Previous suppression of its sale, in this country, did not prevent its being read. In my travels

about the country I have found copies which were smuggled in ten and twenty years ago in the homes of the most eminent and respectable people, including judges and ministers of the gospel. Moreover, should its sale in this country now be forbidden, those who still wish to have copies have only to write to publishers and booksellers abroad. Moreover, restriction of sale or of distribution does not of itself kill a book; on the contrary, evidence shows that such procedure only whets people's appetite. This being so, I fail to grasp the logic which animates those who wish to impede its sale.

As to its sale . . . I have been accused at times of having written it expressly to make money, that is to say, of having purposely used objectionable language in order to make appeal to certain readers and thus further its sale. Nothing, of course, could be further from the truth. I have never written anything expressly to make money. I have been relatively poor, for many years desperately poor, until the last few years. When the book was published in Paris my publisher neglected to obtain an American copyright, because it never occurred to him that it might one day be published in this country. One could hardly say that "we" conspired to bring out a book which twenty or thirty years later would become a best seller in the United States. (At the moment of writing this I am informed that a reputable English publisher will now attempt to bring the book out in England, which is the last barrier in the free world.)

I trust that it is apparent from the foregoing that I am not attempting to present myself as the author of a nice, clean, wholesome piece of work. I think of

this work as a sincere, honest effort which, in liberating me as a person and a writer, has somehow done the same for many others. I make no attempt to evaluate it as literature, since that is the task of posterity. But I feel certain that it is a work which will live no matter what is said or done about it. And even if I am "in the tradition", as most Europeans agree, I do not regard myself as a "monster" but as a sane and useful member of society. I have found life worth living, even when unbearably difficult, and I think this view of life permeates not only the book in question but all my work.

Sincerely,

/s/ HENRY MILLER

APPENDIX D.

Bibliography of Books Written by Henry Miller.

Tropic of Cancer, Obelisk Press, Paris, 1934;

Aller Retour New York (Siana Series No. 1); Obelisk Press, Paris, 1935;

Black Spring; Obelisk Press, Paris, 1936;

Max and the White Phagocytes; Obelisk Press, Paris, 1938;

Tropic of Capricorn; Obelisk Press, Paris, 1939;

Hamlet (with Michael Fraenkel), Vol. 1 (complete); Carrefour, Paris-New York, 1943, Vol. 2; Carrefour, Paris-N.Y., 1941;

The Cosmological Eye, New Directions, N.Y., 1939;

The World of Sex; Olympia Press, Paris, 1959;

The Colossus of Maroussi; The Colt Press, San Francisco, 1941;

The Wisdom of the Heart, New Directions, N.Y., 1944;

Sunday After the War; New Directions, N.Y., 1941;

The Air Conditioned Nightmare; New Directions, N.Y., 1945;

Maurizius Forever; The Colt Press, San Francisco, 1946;

Remember to Remember, New Directions N.Y., 1947;

The Smile at the Foot of the Ladder; Duell, Sloan & Pearce, N.Y., 1948;

Sexus, 2 vols. (Book One of The Rosy Crucifixion); Obelisk Press, Paris, 1949;

The Books in My Life, New Directions, N.Y., 1952;

Plexus, 2 vols. (Book Two of the Rosy Crucifixion), The Olympia Press, Paris, 1953;

The Time of the Assassins; New Directions, N.Y., 1956;

Nights of Love and Laughter; New American Library of World Literature, N.Y., 1955;

Big Sur and the Oranges of Hieronymous Bosch; New Directions, N.Y., 1956;

A Devil in Paradise; Signet Pocket Book, New American Library, N.Y., 1956;

Quiet Days in Clichy; The Olympia Press, Paris, 1956;

The World of Sex (revised edition); The Olympia Press, Paris, 1957;

The Red Notebook; Jargon Books, Highlands, N.C., 1958;

Reunion in Barcelona; The Scorpion Press, Northwood, England, 1959;

The Intimate Henry Miller; Signet Pocket Books, New American Library, N.Y., 1959;

Nexus, Vol. 1; The Olympia Press, Paris, 1959;

To Paint is to Love Again; Cambria Books, Alhaura, California, 1960;

Stand Still Like the Hummingbird; New Directions, Norfolk, Conn., 1962;

Henry Miller, watercolors, drawings, and essay, The Angel is my Watermark, Harry N. Abrams, New York, 1962;

Just Wild About Harry (a Play), New Directors, 1963.